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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

**TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER**

v.

**JOHANNA M. KIND AND HERMANN H. KIND, AS
TRUSTEES UNDER THE LAST WILL AND TESTA-
MENT OF HERMANN KIND, DECEASED**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

The Solicitor General, on behalf of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 426-442) is reported at 161 F. 2d 36. The opinion of the District Court (R. 404-424) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on April 9, 1947 (R. 442). On July 8, 1947, Mr. Chief Justice Vinson extended the time for filing a petition for certiorari until September 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a suit under Section 9 (a) of the Trading with the Enemy Act, as amended, a court of equity should entertain a claim for an interest in enemy property which has been vested by the Alien Property Custodian where that interest had been used to effectuate a scheme to conceal the enemy's interest and thereby to defraud the United States and frustrate its laws.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 13-17.

STATEMENT

The plaintiffs, Johanna M. and Hermann H. Kind, are the trustees and, with two others, the beneficiaries of the estate of Hermann Kind (R. 184-186). They are citizens and residents of the United States (R. 28-30, 179). Prior to Septem-

ber 1939, J. A. Henckels K. G., a German copartnership, owed the estate \$130,000. Of this sum \$55,000 was owed directly and \$75,000 represented a guarantee of a debt owed the estate by one Iwersen, a national and resident of Germany and until 1944 a cotrustee of the estate (R. 428). The \$75,000 debt, and possibly the entire sum, was secured by a pledge by Henckels K. G. of the stock of Graef & Schmidt, Inc., the property in question (R. 428). In the fall of 1939, shortly after the outbreak of war in Europe, the trustees of the estate purported to release the indebtedness of \$130,000 in consideration of the transfer by Henckels K. G. to the estate of all right, title, and interest in the pledged shares (R. 429-430). The formal mechanics of this "release" and "transfer" were an offer by counsel for the trust estate and an acceptance by Iwersen and another in behalf of Henckels K. G. (R. 429-432).

In fact, however, Hermann H. Kind and Iwersen (both being trustees and the latter general manager of Henckels) by correspondence made it clear that this ostensible transfer was a sham and that their true intention was to preserve for Henckels K. G. any amount remaining after satisfaction of the indebtedness (R. 429-436, 440). Johanna M. Kind, the third trustee, was the settlor's widow and the mother of Hermann H. Kind (R. 28-30). While the Circuit Court of Appeals "reluctantly" accepted the District Court's find-

ing that she did not have actual knowledge of the cloaking agreement between her son and Iwersen (R. 440), there can be no dispute, from her testimony, that she had accepted Hermann's word as to what was being done; that she trusted Hermann to "take care of everything"; that, while he "would explain things in a general way" to her, she "left almost everything to him, the details"; and that she had heard of Iwersen's proposal to hold the surplus for the benefit of Henckels, but could not remember whether she had learned of it at the time of the "transfer" (R. 181, 182, 436-437).

In 1943, the Alien Property Custodian,¹ having determined Henckels K. G. to be the beneficial owner, vested the stock as the property of an enemy national (Vesting Order No. 770, January 27, 1943, 8 F. R. 2453; R. 12-14). In 1945, the Alien Property Custodian vested all claims of Henckels K. G. against the estate, including a claim for \$63,000 received by the plaintiffs after the "transfer" as regular and liquidating dividends on the stock (Vesting Order No. 5225, September 14, 1945, 10 F. R. 11913; R. 24-26, 437).

The plaintiffs brought this action under Section 9 (a) of the Trading with the Enemy Act, seeking

¹ By stipulation and order dated October 29, 1946, the Attorney General was substituted as defendant, as successor to the Alien Property Custodian (R. 1), pursuant to Executive Order No. 9788 (11 F. R. 11981), which transferred to the Attorney General the property held by the Custodian.

the return of the stock, or, in the alternative, an adjudication, and satisfaction by the Custodian, of a security interest in the stock (R. 1, 11-12). The Custodian filed a counterclaim for the \$63,000 (R. 23-26).

The District Court directed the return of the stock to the plaintiffs and dismissed the counterclaim (R. 404, 424). The Circuit Court of Appeals, finding the purported release and transfer of the shares a "mere form employed to deceive the United States", held that "no actual purchase and sale occurred", and reversed the judgment of the District Court insofar as it revested title to the stock in the plaintiffs (R. 440, 442). But the court concluded that the estate retained its claim against Henckels K. G., that it might "keep, as in reduction of that claim, the 'dividends' it received" and that it might assert its pledgee's lien on the stock for the unpaid balance of the claim (R. 441, 442), thus granting the alternative relief requested by the plaintiffs.

REASONS FOR GRANTING THE WRIT

1. In this war, as in the last, the enemy has made determined efforts to cloak its interests in property, i. e., to conceal enemy ownership behind ostensible American or neutral owners in an effort to frustrate the enforcement of the Trading With the Enemy Act. *Report of the Alien Property Custodian*, February 22, 1919, pp. 11-12, 39-41; *Annual Report, Office of Alien Property*

Custodian, June 1944, pp. 28-29. Indeed, in this war, cloaking was supervised by the German Ministry of Economics, which issued secret orders for the concealment of German property abroad. Exhibit AAA-1, R. 259-262; *Brassert v. Clark*, decided July 30, 1947 (C. C. A. 2); *Elimination of German Resources for War*, Hearings before a Subcommittee of the Senate Committee on Military Affairs, 79th Congress, 1st Sess., 1945, p. 1203 and *passim*. The Custodian has already vested some 300 interests on the ground that they were cloaked for Germans, the property involved having an estimated value, exclusive of patents, of \$100,000,000. Investigation of suspect transactions is still going forward in Germany and in this country.

The techniques of cloaking have been varied and intricate, and the camouflaged situations thereby created most complex. *Elimination of German Resources for War*, *supra*, pp. 580-583. But all cloaking has had a common denominator—the enemy has attempted first to find someone who could be trusted and who might reasonably be supposed to be the real owner. For this role a pledgee, and particularly a pledgee whose interest predated the period of anticipation of the war, is ideally suited. Protection of his own interests affords a plausible justification for acquiring ownership, and the release of the indebtedness can be advanced as the consideration for the transfer. It is not surprising, therefore, that

some variant or other of the pledge relationship should have been found present in many of the cloaking arrangements thus far uncovered.

In the present case, the first on cloaking to be decided by an appellate court in this war, the cloak was an American estate which had a *bona fide*, long-existing pledge interest in the property to be concealed, and these circumstances were utilized in the attempt to defraud the United States and frustrate its exercise of a war power. The fraud having been detected and the cloak thrust aside, the plaintiffs asked equity to reinstate them in the position they held before the fraud. Whether such a claim should be entertained is an important issue, not only because it bears upon the other cloaking cases, but also because it raises broad questions of the extent to which courts of equity should entertain claims against the Government arising out of transactions which had victimization of the Government as their objective.

2. A suit under Section 9 (a) is, by the terms of that Section, a suit "in equity" (Appendix, *infra*, pp. 14, 15). One who seeks relief under Section 9 (a) must, therefore, come with the clean hands required of all plaintiffs in equity. *Robertson v. Miller*, 286 Fed. 503 (C. C. A. 2), affirmed, 266 U. S. 243. Cf. *Waldes v. Schall*, 11 F. 2d 444, 451 (S. D. N. Y.). In the light of the finding of the Circuit Court of Appeals that the exchange

of the pledge interest for title was "a mere form employed to deceive the United States" (R. 440), a court of equity should not lend its processes to permit the wrongdoers to salvage their former interest.

In the course of applying the clean-hands doctrine, it has been held, in a variety of situations, that one who has misused his property in the attempted perpetration of a fraud cannot invoke the aid of equity to reinstate or enforce his rights in that property. Cf. *Railroad Co. v. Soutter*, 13 Wall. 517, 523; *Commonwealth Finance Corp. v. McHarg*, 282 Fed. 560, 571 (C. C. A. 2); *Baldwin v. Short*, 125 N. Y. 553. The principle is applied with particular breadth and vigor where the public—or the United States—is the intended victim of the misconduct, so that "the financial element in the transaction is not the sole or principal thing involved." (*Pan American Co. v. United States*, 273 U. S. 456, 509.) *Worden v. California Fig Syrup Co.*, 187 U. S. 516; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488, 493-494. Cf. *United States v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 170; *Causey v. United States*, 240 U. S. 399, 402. The courts must be studious to extend no welcome to those who do not "turn square corners when they deal with the Government" (Mr. Justice Holmes in *Rock Island, A. & L. R. Co. v. United States*, 254 U. S. 141, 143).

In prize law there exists the related, equally applicable doctrine, that one who has misused his name and property in order to cloak enemy property cannot, when the cloak has been uncovered and the property seized, recover his property employed in the "iniquitous adventure." *The St. Nicholas*, 1 Wheat. 417, 419, 431; *The Fortuna*, 3 Wheat. 236, 245; *Carrington v. Merchants' Insurance Co.*, 8 Pet. 495, 520-521. The explicit provision in the Trading With the Enemy Act for the forfeiture of all property concerned in a violation of the Act, as well as for fine and imprisonment of the offender (Section 16, Appendix, *infra*, p. 16) should not be taken to preclude the invocation of the traditional defense of unclean hands, or the related defense available in the prize cases, but rather as confirmation that like results, when compelled by familiar equitable principles, are consistent with the policy of the Act. Cf. *Bement v. National Harrow Co.*, 186 U. S. 70, 87-88; *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227; *The Hampton*, 5 Wall. 372, 376. See *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 177.

These principles are no less germane here because the fraud in this case was effected by the use of property in trust. It has long been recognized that property cannot be insulated from the effects of prize and analogous law by the divorce of possession and control from ownership. *Restatement, Trusts*, Sec. 273, Comment e; *The*

Hiram, 1 Wheat. 440; *The Hampton*, 5 Wall. 372; *Dobbins' Distillery Co. v. United States*, 96 U. S. 395; cf. *Mitchell v. Sherman E. McEwen Associates, Inc.*, 360 Ill. 278. On the facts here, therefore, it is immaterial that one trustee (Johanna) was not shown to have been explicitly informed of the cloaking agreement which was devised by her co-trustees. The considerations of policy applicable to equitable owners, guilty of neither fraud nor negligence, apply with greater force to a sleeping trustee who, in dereliction of her duty, has abandoned control of the property to co-trustees whom she had at the least strong reason to suspect of employing it to cloak enemy property. Cf. *American Insurance Co. v. Lucas*, 38 F. Supp. 896, 923 (W. D. Mo.), appeal dismissed, 314 U. S. 575, affirmed *sub. nom. American Insurance Co. v. Scheufler*, 129 F. 2d 143 (C. C. A. 8), certiorari denied, 317 U. S. 687, rehearing denied, 317 U. S. 712. Johanna was apparently no more than a straw co-trustee, whose role it was to remain inactive so long as things went according to plan but to be brought forward in the robes of innocence if they did not. Cf. *The Hampton*, *supra*.

But even if Johanna's abdication of her responsibilities as trustee were insufficient to disqualify her from relief, there could be no justification for permitting the facilities of an equity court to be used by Hermann H. Kind, who, while both a trustee and beneficiary of the estate, know-

ingly participated in the cloaking scheme. Certainly a court of equity should not help him to recover his substantial share² in the property which he used to effectuate the fraud.

For the same reasons as apply to the claim for reinstatement of the pledge, there is error in the holding of the court below that the plaintiffs may retain the \$63,000 which they received as dividends while the stock was in their possession and ostensible ownership pursuant to the sham transfer. Henckels K. G. has been held to have been the true owner of the shares in question at the time the dividends were paid, and the Custodian has vested the claims of Henckels K. G. against the estate, including this claim for \$63,000. We believe there is no legal or equitable ground for treating the \$63,000 differently from the remainder of the plaintiffs' security interest in the stock. If, as we maintain, the plaintiffs are equitably disqualified from asserting this lien, they should not be awarded partial satisfaction in the amount of the dividends.

² The will of the elder Hermann Kind in substance directs that the income from the trust estate be paid to Johanna for life and that upon her death the principal "be divided into as many equal parts as I shall have left children me surviving, then living, and children who shall have died, leaving lawful issue then living," such equal parts to be transferred and paid over per stirpes (R. 185, 186). The elder Kind was survived by Hermann H. and two other children, all of whom are now living; two of the children have issue, and Johanna is still alive (R. 29).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1947.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-31):

SEC. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b):

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 9 (as amended by the Act of March 4, 1923, c. 285, 42 Stat. 1511):

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, as-

signed, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a

party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 16. That whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of

any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.